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MASSACHUSETTS BAR ASSOCIATION.

NOTICE OF ANNUAL MEETING.

The twenty-eighth annual meeting of the Massachusetts Bar Association for the election of officers, consideration of the reports of committees and such other business as may come before the meeting, will be held on Saturday, February 26th, 1938, at 11.00 A. M., in the rooms of the Boston Bar Association in the Parker House, Boston. This date and hour were selected to give members an opportunity to attend the annual Bench and Bar dinner of the Boston Bar Association, which will be held that evening and at which Senator Wheeler and Hon. Charles H. Donahue are to speak.

The report of the Nominating Committee will be found on page II.

After the regular business there will be opportunity for discussion of the report of the Judicial Council, requested by the legislature, relative to organization of the bar in the thirteenth annual report (pp. 35-39 and Appendix A, pp. 45-53) and other matters contained in that report, or otherwise brought before the meeting. The thirteenth report will be found in the "Preliminary Supplement" of the QUARTERLY recently issued.

FRANK W. GRINNELL, *Secretary*,
60 State Street, Boston.

THE BENCH AND BAR DINNER.

The annual Bench and Bar dinner of the Boston Bar Association will take place on Saturday, February 26th, 1938, at the Hotel Somerset in Boston. Reception at 6.30 P. M. Dinner at 7.00 P. M. Senator Wheeler and Hon. Charles H. Donahue will be the speakers.

Members of the Massachusetts Bar Association are invited to attend the dinner. The price of the tickets will be \$3.00 and they may be obtained from Charles C. Cabot, Secretary, 50 Federal Street, Boston, upon application accompanied by a check. Prompt application will be very helpful.

(I)

REPORT OF NOMINATING COMMITTEE.

To the Members of the Massachusetts Bar Association:

Your committee submits the following nominations for the year 1938:

For President:

HENRY R. MAYO,
of Lynn.

For Vice-President:
FREDERICK LAWTON,
of Boston.*For Treasurer:*
HORACE E. ALLEN,
of Springfield.*For Secretary:*
FRANK W. GRINNELL,
of Boston.*For Members At Large of the Executive Committee:*

MORRIS R. BROWNELL, of New Bedford,
JAMES A. CROTTY, of Worcester,
SYBIL H. HOLMES, of Brookline,
P. JOSEPH McMANUS, of Arlington,
LISPENARD B. PHISTER, of Boston,
PHILIP RUBENSTEIN, of Brookline,
ROMNEY SPRING, of Boston,
RICHARD B. WALSH, of Lowell.

Under the by-laws other nominations may be sent to the Secretary in writing before the meeting.

NATHAN P. AVERY, *Chairman.*

Note.

The President, the last ex-President, the Treasurer and the Secretary are members of the Executive Committee *ex officio*.

Under the by-laws the presidents of the following thirteen *affiliated* associations, or delegates of such associations designated by them, are members *ex officio* of the Executive Committee of the Massachusetts Bar Association:

Barnstable County Bar Association,
Berkshire County Bar Association,
Bar Association of the City of Boston,
Bristol County Bar Association,
Brockton Bar Association,
Essex Bar Association,
Franklin County Bar Association,
Hampden County Bar Association,
Hampshire County Bar Association,
Law Society of Massachusetts,
Bar Association of the County of Middlesex,
Norfolk County Bar Association,
Worcester County Bar Association.

ORDER OF INHERITANCE AMONG KINDRED — READY
REFERENCE TABLE OF DEGREES OF KINDRED.*By GUY NEWHALL.**(Author of "Settlement of Estates and Fiduciary Law in Massachusetts".)*

Where a decedent dies intestate leaving "no issue, and no father, mother, brother or sister, and no issue of any deceased brother or sister," so that his estate descends to his next of kin, the following table will be found convenient for determining the order of inheritance among his kindred. The various groups of kindred are listed in the order of their priority, together with their degree of kindred to the decedent. The *living* members of each class enumerated take in preference to those of subsequent classes. They share equally, regardless of whether they claim on the father's or mother's side of the family. Children of deceased members of the class are excluded. The reason for the priority of one class over others of the same degree of kindred is that their relationship is traced through a nearer ancestor. (G. L. 190, § 3, cl. 6.)

(NOTE: The computation of degrees of kindred under Massachusetts law is usually a headache for the lawyer who has to do it. With the aid of the following table it is a simple matter to determine who are entitled to the estate.)

- First:* Grandparents—2d degree of kindred.
- Second:* Uncles and aunts—3d degree of kindred.
- Third:* Great-grandfathers and great-grandmothers—3d degree of kindred.
- Fourth:* First cousins—4th degree of kindred.
- Fifth:* Great-uncles and great-aunts—4th degree of kindred.
- Sixth:* Children of first cousins—5th degree of kindred.
- Seventh:* First cousins of father or mother—5th degree of kindred.
- Eighth:* Brothers and sisters of great-grandparents—5th degree of kindred.
- Ninth:* Second cousins—6th degree of kindred.
- Tenth:* First cousins of grandparents, (*i.e.*, children of Eighth Class)—6th degree of kindred.
- Eleventh:* Children of second cousins—7th degree of kindred.
- Twelfth:* Children of first cousins of grandparents, (*i.e.*, second cousins of parents)—7th degree of kindred.
- Thirteenth:* Third cousins, (*i.e.*, children of those in the Twelfth Class)—8th degree of kindred.

THE PROMULGATION OF THE NEW RULES FOR THE
FEDERAL COURTS.

SUPREME COURT OF THE UNITED STATES,

Washington, D. C., December 20, 1937.

My dear Mr. Attorney General:

By direction of the Supreme Court, I transmit to you herewith the Rules of Civil Procedure for the District Courts of the United States which have been adopted by the Supreme Court pursuant to the Act of June 19, 1934, chapter 651 (48 Stat. 1064).

In accordance with Section 2 of that Act, the Court has united the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. The Court requests you, as provided in that section, to report these rules to the Congress at the beginning of the regular session in January next.

I am requested to state that Mr. Justice Brandeis does not approve of the adoption of the rules.

I have the honor to remain

Respectfully yours,

/s/ CHARLES E. HUGHES,
Chief Justice of the United States.

Honorable Homer Cummings,
Attorney General of the United States,
Washington, D. C.

THE ACT OF JUNE 19, 1934, CH. 651.

Be it enacted. . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. *They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.*

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.* (Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U. S. C., Title 28, §§ 723b, 723c.)

The Work of the Supreme Judicial Court.

Address by Hon. Henry T. Lummus

At a Luncheon of the Boston Bar Association, December 18, 1937.

In the first place I want to call your attention to the difference in position of the Full Bench and the Superior Court. The Superior Court is always digging into a mountain of cases that are constantly piling up on the other side. Under ordinary conditions it can never hope to get through. It is not expected to get through. The Supreme Judicial Court is expected to clear up its business year by year. If it does not do so fault is found and the judges are much distressed at being behind in their work. The conditions under which the two courts operate are very different in this vital respect.

You may want to know how the time of an associate justice of our court is spent. I ought to say parenthetically that the chief justice has a harder task, because although he never sits as a single justice he sits in every one of the full bench sessions, and has much administrative work.

Take the time of an associate justice. We subtract from the 365 days of the year 52 Sundays and 11 holidays on which a justice is not expected to work, although in fact one day is much like another to him. That leaves 302 days. Consultations which all the judges must attend occupy about 27 days, leaving 275 days. Sittings of the full bench occupy about 75 days, and since each associate justice sits two-thirds of the time, two-thirds of 75 days, or 50 days, must be deducted, leaving 225 days. Single justice work requires about half time for two months, or perhaps 25 days, leaving 200 days. Work done upon cases in which the judge sits but does not write the opinion, often made necessary by some doubt as to the correctness of the opinion, requires not less than 15 days, leaving 185 days. Most of the judges attend the meeting of the American Law Institute at Washington in May, requiring about four days, leaving 181 days. If we allow a judge three weeks or eighteen days vacation—which is more than many of us get—the time that can be devoted to writing opinions is reduced to 163 days.

During a ten-year period the average number of opinions annually has been $458\frac{1}{2}$, which means more than 65 for each judge. Writing 65 opinions in 163 days means an opinion every two days and a half, to say nothing of the performance of the many incidental duties of the position. Writing an opinion seldom takes less than a day, usually takes several days, and sometimes takes several weeks. And then, if some judges become ill or get behind in their work, the burden thrown on the others may add ten or fifteen cases to each of them.

You may ask, How can such a burden of work be borne? Our court has nothing to say as to the volume of work that we must turn out. Any case that counsel or parties wish to bring to us we must take. We cannot limit our business to our capacity for work, as does the Supreme Court of the United States. Our work is speeded up to a point that almost outdoes the Bedaux system in factories. We really ought to have seven supermen in capacity for turning off work. Fortunately, we have had some supermen. The present chief justice and his two immediate predecessors have been hardly less than that in respect to the immense volume of their accomplishment. Some of their associates have been little inferior to them in that respect. But it is not every competent and highly valuable judge who has such facility. The most conspicuous example of that truth that I think of is the great Lemuel Shaw, who had very little capacity for turning off work rapidly. We cannot expect to find constantly seven men who can keep up such a pace.

Moreover, there is a public danger in having decisions which mould and shape our law for the future beaten out at white heat as ours must be. We ought to have leisure to read widely, to know the current trends of the law as well as its past history, and to pursue our investigations to the bottom. I am aware that in some other states courts of last resort that have plenty of time for their work seem to do no better work—as I thought long before I became a member of our court, and think still—than our overburdened court. But the health of the jurisprudence of the Commonwealth, and also the physical health of the judges, really demand some relief, or will do so in the near future. The judges hitherto have uncomplainingly kept their noses to the grindstone, working on all days and at all hours, with hardly a rest or a holiday, even in the summer.

What can be done about it? Seven justices are enough for the highest court of a state. Increasing the number of judges would make consultation and agreement more cumbrous and more protracted, and that would destroy any gain that might result from having more men writing opinions. Chief Justice Hughes recently pointed that out with respect to the Supreme Court of the United States. Deciding cases without opinions would never satisfy losing parties, much as it might satisfy the bar in general, and would give comparatively little relief, for after a case has been thoroughly studied and analyzed and a conclusion has been reached, the mere expression of the views of the court takes comparatively little time. Shorter opinions have been suggested; but though brevity is desirable it is usually achieved through greater labor rather than less. A reduction in the number of cases is the only practicable form of relief. How is that to be accomplished? There are objections to an intermediate

appellate court which have been cogently stated by Mr. McClenen in earlier years. Perhaps certain classes of cases might be put through an appellate division of the Superior Court before reaching our court.

I do not know what the answer to my question is. I only know, as I have said, that the work is speeded up to a point that is almost unbelievable to any one who has not tried it. I think I was able to do as much work on the Superior Court as almost any other judge there, but I find that the present task takes all my time and all my strength.

What happens after a case is argued in our court? We leave the bench, as you know, at quarter past three. We retire to the consultation room and discuss each case in turn, beginning with the senior associate justice and ending with the chief justice. This is called the "Semble." Then the chief justice assigns the case to some justice to write the opinion. When he can get it done depends upon the state of his work. The justice writing the opinion may receive valuable help from one of the law clerks attached to the court in collecting the authorities and sometimes in suggesting grounds of decision. But of course the idea that one senator appears to have entertained last year, that the law clerks write opinions, is absurd. I personally wish we could find a law clerk who could write some opinions for me. We have not yet found one that we should wish to trust with such a task. No man of mature age and experience would be content to entrust such a task to an inexperienced youth, no matter how brilliant he might be. The opinions expressed by the judges at the Semble are only tentative, and sometimes the final result is contrary to the opinion of every judge at the Semble. In other words, the judge who is to write the opinion, on studying the case intensively, sometimes finds that he was wrong and everybody else was wrong at the Semble, and that the case must come out the other way.

At periods during the year are held consultations, at which the judges bring in the opinions that they severally have written and read them to the other judges who sat in the cases. A discussion often ensues, changes are suggested, and any judges who are not willing to agree to the opinion at the time may take it to read and study. Often memoranda are written by different judges in support of or against the opinion, and these circulate through the quorum until every judge has taken a definite stand. An opinion must receive at least four affirmative votes to become the opinion of the court, and that is true, no matter how many or how few judges sit in the case.

A judge who doubts the correctness of an opinion adopted by a majority has several courses open to him. If he himself comes to doubt the correctness of his doubt, so to speak, he may yield to the opinion of

his fellows, under the rule stated as to jurors in the famous case of *Commonwealth v. Tuey*, 8 Cush. 1. If he cannot agree to the opinion, but the point is small and not likely to cause future difficulty in the law, the opinion may be put out as a majority opinion. If he feels deeply about the matter, he may dissent. But a dissent, though it does little harm among lawyers, may do harm among laymen who like to feel that the law is an exact science and look upon differences of opinion as indicative of incompetence on one side or the other.

Sometimes the writer of an opinion finds that he cannot get complete assent to it from his fellows. In that case, if he cannot bring himself to their view, he sometimes states his partial dissent in his own opinion, rather than require some other judge to write the case anew. For a recent example, see *Reed v. Home National Bank*, Mass. Adv. Sh. (1937) 639. Sometimes the writer of an opinion which does not command concurrence is himself converted, and writes a new opinion the other way. The popular idea, shared even by the bar, that the writer of an opinion is more responsible than other judges for the result, is nonsense. I have a number of cases in mind in which the writer of the opinion wrote the case the other way on his first attempt and was overborne, with the result that either cheerfully or reluctantly he came around to the view of his fellows. A great many cases come before us in which the weight of the arguments on one side and the other is nearly even, and different men, or the same man at different times, may take different views.

Our plan of reading the opinions aloud at the consultation is apt to be condemned by the bar and by new justices who come upon the court. They say the opinions should be printed and proof should be handed around for reading, as in the Supreme Court of the United States. I thought so myself at first. If our volume of business were much less, that plan would be practicable. But one gets his ear well trained, and someone is pretty sure to catch any statement of bad law. If with our volume of business the Federal plan should be adopted, we should be buried in galley proof, and I doubt whether we should get as much time to study the opinions as we do now.

How should a lawyer about to argue before the full court proceed? The first thing he should do is to put himself in imagination in the place of the court. You remember the story of the farmer's boy who was very successful in finding lost cattle. When asked how he did it, he said he tried to think where he would go if he were a cow and got loose. The lawyer ought to imagine himself a judge, and ask himself what sort of argument would really help him decide a case. He would find that oratory of the old-fashioned type would not help, that he would wish to

get the facts clearly, without suppression or distortion, and that he would wish to know the state of the established law, the current trends of the law, and the practical consequences of the adoption of the competing rules for which counsel are contending.

I think that is the main secret of good and bad arguments. Take a simple instance. At every sitting we notice that many counsel about to make a motion in a case on the list do not put themselves in our place sufficiently to make the motion properly. They rise and say:

"In the case of Jones v. Smith, No. 4711, I wish to make a motion."

About that time the Chief Justice says, "Where is the case?" And then they fumble around with the list and finally discover on what page the case appears. By that time we have forgotten the name of the case which was stated in the first place, and some time is spent in finding it. Whereas, if the lawyer should put himself in our place he would see that he should say:

"In a case on page 12 of the list, the third case down from the top, No. 4711, Jones v. Smith."

As soon as he had said that the Court would have the case before it. It is just want of imagination that makes trouble even in such a trifling thing as that.

The same want of imagination is the cause of a good deal of bad argument. I suppose the prime necessity in arguing a case is the making of an orderly, clear, uncolored statement of it. It really is surprising to see what a small percentage of the bar appears capable of that. Not only in our Court but in every court there is nothing so necessary to an advocate as the ability to state a case in an orderly, plain, uncolored fashion.

You remember the story of the English judge. Counsel was stating the case. He began in the middle and jumped from one end to the other until the judge became exasperated and said, "Mr. So-and-So, I wish you would adopt some order in the statement of the case. The chronological order is ordinarily the best, but for Heaven's sake have some order, even if it is only an alphabetical order."

I do not believe there is anything that will so well repay a practitioner as the study of the art of stating a case. I remember when the late Mr. Rackemann came up before us to argue the constitutionality of the Declaratory Judgment Law. We opened the papers and began to skirmish around through them trying to find what the case was about. That is a necessity in many of the cases argued before us, for otherwise we should not know what they were about. Mr. Rackemann said:

"May it please the Court, if the members of the Court will refrain from examining the papers in the case and will give me their attention, I think I can put them in possession of the facts in much shorter time than they otherwise could learn them."

I must say for Mr. Rackemann that he made good that promise. It is not every counsel who might say those words who would be able to make them good, but he did. He stated the case beautifully.

Statement is the first thing. So many counsel make an inadequate or an untrue or colored statement of the case, and then rush into what they conceive is their argument. They would do much better to state the case well and then sit down, than to state the case badly and then go on with the best argument that could be made on a bad statement of the case. After all, a case well stated, assuming that the Court knows its business at all, is two-thirds argued as soon as the statement of the case is finished.

In the statement of the case some counsel are tempted to distort the facts a little their own way or to omit troublesome facts. I think there is nothing more irritating to a judge than to have counsel purport to state a case and then state it untruly. It is very bad psychologically, because omitted facts stand out conspicuously when the counsel on the other side call attention to them or the Court discovers that they exist. They are much more conspicuous than they would have been if they had been stated properly in the first place.

When the case has been stated comes the argument of it. I assume that your briefs are going to be full. The brief, after all, is the thing that stays with the Court when the oral argument is forgotten. Everything must be in the brief. The brief should contain all your citations. By the way, speaking of citations, I begin to be a little suspicious of counsel when sometimes they ask me if the judges have to read all the cases that they cite in the opinion. I usually answer that as a rule the judges read about ten times the number of cases they cite. Such questions make me doubt whether counsel always study carefully all the cases they cite. I have known counsel to go to some book like the Encyclopedia of Law and find a principle that they can use, and then, instead of citing the Encyclopedia for what it is worth and letting us find the cases, they just take out of the book half a dozen or a dozen cases the names of which look pretty good and throw them in, and sometimes they omit to name the Encyclopedia from which they got them. Then the Court finds itself just a bit irritated at discovering that the cases cited do not support the proposition at all, and especially when it discovers how they were collected. The counsel really were putting their worse foot forward, because if they had

cited the Encyclopedia they could lay it to the Encyclopedia if the cases didn't support the principle. Counsel who cites a case impliedly warrants that he has read and studied it and that according to his judgment the case supports the proposition for which it is cited.

Now, as to the argument. The Court is not much interested in citation-chopping in argument, counsel assuring us that in this case such a thing was decided and in another case something else was decided. The Court ordinarily is not familiar with those cases unless they are great leading cases, or recent cases in this jurisdiction. If they are minor cases or cases from other jurisdictions, the Court usually does not know them, and does not know what counsel are talking about when these cases are discussed.

What you are aiming for in the argument is to get the first impression of the Court in your favor. The ultimate study will be made with the use of your brief. The argument, like shock troops, may take the trench. Your brief, coming up afterwards, may hold it. But you want to get the favorable opinion of the Semble. You want to get the court headed right. To do that you should discuss principles and very seldom refer to cases unless there is some case that directly controls the point or unless the proposition for which you contend is an inference from some important case.

Quite as common as citation-chopping is another bad habit, and that is brief-reading. Many counsel open their briefs in front of them and proceed to read. When a judge finds that counsel is doing that, once he has determined the pace in miles an hour at which the lawyer reads, he can go out and stay ten minutes and know the exact place where the lawyer will be on his return.

Such reading is dull and depressing. It does not accomplish anything. It simply tires the court. The court is going to have your brief. I think there has never been a case in the history of Massachusetts where a man has been chosen for the Supreme Judicial Court who could not read for himself. You are just wasting your time by reading the brief. To be on the safe side and to shun temptation, you had better put the brief in the seat of a chair and let someone sit on it, or else leave it in your bag. If you are not familiar enough with your case to argue it without aid from your brief, you would better not argue at all. If you do argue, stand up and look at the Court. Don't be looking down reading something. Tell the Court in plain words, first, the case; second, the reasons why you contend that the decision should be your way. When you get through with that, sit down.

Don't try to argue orally everything that may be in your brief. There

are cases that come before us not on one point, but on twenty points. It would be silly to try to argue the twenty points. Some of them are minor and some of them may be of more importance. There is no use in arguing orally a miscellaneous collection of points. Confine yourself to the points that you can argue with force and effect, and simply say to the Court that you submit the rest of your case on the brief. *In fact you do not have to say that, because you do not waive anything that is in your brief, whether you say anything about it or not.*

There is another mistake that you frequently see made. Usually it is accompanied by an inadequate statement of the case. A lawyer will make a sort of fragmentary statement of the case, and before the Court can grasp it at all he will begin to get excited and emotional and to become denunciatory of the other side. You might just as well put on a Punch and Judy show as to argue a case in that way. The Court cannot share the emotions of counsel when it does not yet know what the case is about. If there has been a great fraud perpetrated on your client and you state the case plainly and unemotionally, the Court can see the fraud as clearly as you do. If it is a real fraud the judges are just as likely to get indignant about it inside if you keep calm.

Another fault that is common is arguing outside the record. Frequently, the argument consists of a mixture of things, some of which are in the record and some of which are not. Of course we pay no attention to things that are not disclosed by the record, and if we find counsel stepping in and out of the record we begin to doubt whether much of what he says is supported by the record.

Lastly, on the question of brevity. Sidney Bartlett was one of the great lawyers of Massachusetts, especially in argument before the Full Court. He was always brief. He stated the case well, he argued a few matters of principle, and then he sat down. Sometimes he sat down when the Court wished he would go on. But his sole purpose was to get the Court headed right, and that really is the purpose of an argument.

Some counsel seem to have the idea that no matter how small the point they must use up the allotted time. That is bad policy, even in jury cases. Some of the most successful jury lawyers make brief arguments. Surely before the Full Court, which is supposed to be able to see a question of law once it is clearly presented, to keep on with an oration beyond the point where the Court is being educated is absurd.

I do not wish to appear condemnatory of the entire bar. There are quite a number of lawyers, some of whom I see before me, whose arguments are models to be followed. But I really think there are many men at the bar who ought to put themselves in imagination in the place of the court, and if they do so, I think they will revise some of their methods.

REGULATION OF PRACTICE AND PROCEDURE * IN MASSACHUSETTS

INTRODUCTORY REMARKS

The constantly growing movement throughout the country for a revival of the exercise of the administrative function of courts in order to bring about more business-like methods of administering justice to meet the demands of modern life, receives added strength from the recent action of the Supreme Court of the United States under the act of Congress of 1934 which, with the letter of Chief Justice Hughes, announcing the adoption of the new rules for the federal courts, is printed on page IV of this issue of the "Quarterly"; the act provides that six months after the promulgation of such rules "all laws in conflict therewith shall be of no further force or effect."

Under this act, the Supreme Court selected an advisory committee (a temporary judicial council) of which Robert G. Dodge, Esq., of Boston, a former member of the Judicial Council here, is one of the representatives of the practising bar, and this central committee with the assistance of local committees in all the federal circuits and in many of the federal districts chosen by the local bar associations or federal judges, has been at work for more than two years in the preparation of a new set of rules for the federal courts. Copies of the annotated drafts were circulated and subjected to constant revision. It has been the most extensive co-operative professional movement of lawyers, all serving without compensation, that this country ever has seen. It illustrates that the modern revival of this judicial function does not contemplate the unaided exercise of this function by an aloof court, but that the development of to-day and the future is, and will be, a co-operative proceeding between the bench and the bar in the interest of the public. This form of proceeding offers a much greater opportunity for careful consideration of details of procedure with the possibility of change in the light of experience than the necessarily hurried consideration of such matters by an over-burdened committee of the legislature, whose attention is distracted by many other problems.

The Committee on Judicial Procedure of the Boston Chamber of Commerce, approaching the study of the administration of justice from the point of view of experienced business men studying a business which costs the commonwealth and the

* Other recent discussions of the general subject appear in the American Bar Association Journal for November 1936, p. 772 and the "Bar Bulletin" of the Boston Bar Assoc. No. 133, Feb. 1938.

litigants some millions of dollars annually has recommended that the legislature pass an act similar to the act of Congress recognizing the authority of the courts to regulate practice and procedure, on the ground that the people consider the courts responsible for the administration of justice and that the ability to adjust methods to the changing needs of the community should be in the hands of the constitutional body which is charged with such administration. Such an act was favorably reported by the Judiciary Committee and passed the Senate at the last session, but was defeated in the House. The act has again been introduced and is now pending before the legislature.

This fact and the nation-wide discussion of the subject have led us to make some study of the constitutional and statutory history of the subject in Massachusetts.

Under the opinions and in view of the history of the statutes hereinafter referred to, it seems possible, in spite of the long period of inactivity in the exercise of the function, that the rule-making authority of the Supreme Judicial Court, which appears to be part of the constitutional jurisdiction of that court, is unrestricted by legislation in all matters of procedure and practice as distinguished from matters of substantive law.

The History and Scope of the Existing Rule-Making Functions of Massachusetts Courts.

In the address of Dean Pound before the Conference of Bar Association Delegates, a few years ago, appears the following passage:

"When American constitutions were adopted, the power to make general rules governing procedure was and had been for centuries in the King's courts at Westminster. Causes were not heard ordinarily at bar in those courts. They were tried at circuit. But the procedure was regulated by general rules of practice promulgated by the judges of the Superior Courts at Westminster. Turn to Tidd's Practice, which was the standard book on English procedure when our American constitutions were adopted. You will find there general rules of practice, some of which go back as far as Richard II, many as far as the Tudors, and several as far as the first years of James I, from which we date the reception of the common law in this country.

"Hence, if anything was received from England as a part of our institutions, it was that the making of these general rules of practice was a judicial function. Indeed, this was well understood in the beginning of American law.

At the very outset, the Supreme Court of the United States, in answer to an inquiry by the Attorney General, said that the practice of the court of King's Bench would obtain for the time being, but that presently the court would promulgate some rules of practice. Not only was this done by the Supreme Court of the United States, but the old Supreme Court of New York, before 1847, promulgated rules of practice, very many of which were simply turned into sections of the Code of Civil Procedure and are in force under that guise to-day.

"But, some will say, granting that such a power might exist in a supreme court, with respect to practice in that court, how far could such a tribunal constitutionally provide rules for subordinate courts which are likewise constitutional? Here again the historical argument is decisive. At the time our constitutions were adopted, the power to prescribe rules of practice for the nisi prius courts was an immemorial power of the Superior Courts at Westminster. The Courts of Assize and nisi prius were independent courts. Yet the practice in both was governed by general rules made by the courts at Westminster which had authority to review their proceedings. Indeed, we have good American precedent for this argument. In Ohio, the probate court is a constitutional court. In that state a statute provided that the Supreme Court might prescribe rules of practice governing the probate courts. That statute was upheld because historically the power of the court of review to promulgate rules of practice for tribunals of first instance had always been a judicial power."

Turning to Tidd's Practice, which, as Dean Pound said, was the standard book about the time that American constitutions were adopted, the first edition appeared about 1790 and it ran through eight editions by 1824. In the first volume of the eighth edition, which is before us, appears a twelve-page index of all the general rules and orders of the three courts of the King's Bench, Exchequer and Common Pleas from 1604, in the reign of James I, to 1822, in the reign of George IV. These rules and orders related to almost every conceivable detail of procedure and practice.

Turning now to Massachusetts, in the case of *Crocker v. Justices of the Superior Court*, 208 Mass. 163 (at pp. 170-172), Chief Justice Rugg said:

"By the Prov. Laws, 1699, c. 3, §1 (Acts and Resolves of the Province of Massachusetts Bay, Vol. I, p. 371), it was

enacted, 'That there shall be a superior court of judicature, court of assize and general gaol delivery, over this whole province . . . who shall have cognizance of all pleas, real, personal or mixt, as well all pleas of the crown and all matters relating to the conservation of the peace and punishment of offenders as civil causes or actions between party and party . . . and generally of all other matters, as fully and amply to all intents and purposes whatsoever as the courts of king's bench, common pleas and exchequer within his majesty's kingdom of England have or ought to have.' This statute has frequently been referred to as a source of jurisdiction of the courts of this Commonwealth . . .

"When the Constitution of Massachusetts was adopted in 1780, c. 6, art. 6, provided that 'All the laws which have heretofore been adopted, used and approved, in the Province, Colony or State of Massachusetts Bay, and usually practised on in the courts of law, shall still remain and be in full force, until altered or repealed by the Legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.' The general body of jurisprudence which had heretofore existed was thus preserved and continued. By St. 1780, c. 17, an act approved February 20, 1781, the jurisdiction of the Supreme Judicial Court was defined to be the same as 'By particular laws were made cognizable by the late Superior Court of Judicature, Court of Assize and General Gaol Delivery, unless where the Constitution and Frame of government hath provided otherwise. . . .

"Speaking broadly, it possessed, as to the subjects within its original jurisdiction, the powers which courts of King's Bench, Common Pleas and Exchequer had at common law in England before 1699, and such as had become a part of our body of common law before our separation from England, as well as those expressly conferred upon it by statute."

This last statute did not create the Supreme Judicial Court or its jurisdiction, but was simply a statutory recognition, to remove doubt, of the existence of the court and its jurisdiction as established by the constitution, which took effect on the last Wednesday of October, 1780. The detailed history of the continued existence of the court during the period of transition from 1775 to 1781 appears in an article by Horace Gray (later Chief Justice of the Supreme Judicial Court) in 1858 on, "The Power of the Legislature to Create and Abolish Courts of Justice," (See *Law Reporter* for June, 1858, Vol. XXI, p. 65). He concluded

his study of the continuous existence and constitutional establishment of the court as follows:

"The first Governor [John Hancock], as we have seen, without any authority from the state legislature, or other instruction, except the Constitution; without any direction even as to the number of judges whom he might commission, except the Province law of 1699, establishing the Superior Court of Judicature; proceeded at once to commission all the justices of that Court, and no others, as judges of the Supreme Judicial Court of this Commonwealth. The Legislature (who had already established the salaries of these judges), four days later, *to avoid any possibility of doubt* concerning the continuance of the old Superior Court, declared that 'by the Constitution and Frame of Government of the Commonwealth of Massachusetts, the style and title of the same court is now the Supreme Judicial Court of the Commonwealth of Massachusetts;' and vested the supreme judicial authority in the Supreme Judicial Court already so commissioned by the Governor. And the supreme judges, on the very day of the passage of this act, held their first term, the time and place of which were fixed only by the Province laws concerning the Superior Court. It would be difficult to find an instance in which the construction of a constitutional provision was more immediately and distinctly determined by the concurrent acts of the three great departments of the government."

It seems, therefore, that the Supreme Judicial Court was not only carried over by article 6 and 9 of Chapter 6, but, as carried over, was established directly by the constitution with all the jurisdiction in regard to procedure and the authority to form and issue writs which it had had since 1699; and that this was immediately recognized by the legislature in 1781 after the court had already begun to function under the constitution. By Chap. 9 of the Acts of 1782, the legislature again recognized the jurisdiction of the court in more detail and in § 4 provided

"That the same Supreme Judicial Court shall and may from time to time, make, record and establish all such Rules and Regulations with respect to the admission of attorneys, ordinarily practicing in the said Court, and the creating of Barristers at Law, and all other Rules respecting Modes of Trial, and the Conduct of Business, as the Discretion of the same Court shall dictate. *Provided always,* That such Rules and Regulations be not repugnant to the Laws of the Commonwealth."

In the acts of 1820, c. 79, §7, creating the Court of Common Pleas, the legislature provided,

"And said Court of Common Pleas shall have power, from time to time, to make and establish all such rules for the entry of actions, filing pleas in abatement, and demurrers to declarations, and for the orderly and well conducting the business thereof, as may be thought proper: *Provided*, the same are not repugnant to the laws of the Commonwealth" (cf. Rev. St. c. 81, §10 and c. 82, §36, Commissioners' Report, Part III, pp. 12 and 18).

The language of the earlier acts has been somewhat qualified by later statutes, but the present statutes, G. L. c. 213, §3, still expressly recognize quite broad regulatory jurisdiction on the law side of the court. Since the equity jurisdiction of the Supreme Judicial Court and the Superior Court was established in 1877 and 1883 in accordance with the "General Principles of Equity Jurisprudence" there has been full regulatory authority in equity in the hands of the Supreme Judicial Court subject to any specific statutory provisions of which there are few, and, by the act of 1926, c. 138, the Superior Court, which now hears most of the equity cases in the first instance, was given the same full rule-making power in equity as follows: "Procedure, process and practice in equity cases originating in the Superior Court, or transferred thereto from any other Court, shall while in the Superior Court, be regulated by rules made from time to time by that Court."

Our district courts also have a considerable amount of such jurisdiction (See G. L. c. 218, §43 and 50) and the practice in the Land Court, which was created in 1898, was by the statute left very largely to the judges to develop in accordance with the practical demands of the work under the new system, which has been one of the constructive chapters in our judicial history since 1898.

The fact that the courts have not used their authority to any great extent until the Superior Court established the pre-trial session, the jury-pooling and other changes a couple of years ago does not mean that the authority does not exist. As Judge Atwood, formerly of the Supreme Court of Missouri, said in an address to the Ohio State Bar Association in January, 1934 (reprinted in the *American Bar Association Journal* for April of that year):

"That courts have judicial powers which now lie unused or undeveloped is suggested by the fact that for the first half of our national history the judicial branch of govern-

ment carried full responsibility for the administration of justice. The bench and bar were not then so constituted as to be responsive as to needed reforms and legislatures sometimes acted in matters strictly judicial because there was no other organ for the expression of the popular will. If it so happens that now the attitude is reversed and legislatures are generally unresponsive to reform needs, it is but natural that the people should turn to the courts. By the mere encroachment of one, or the neglect of another, neither branch of government can gain or lose power in contravention of the constitutional separation of power. Assuming the existence of such a constitutional provision, powers belonging to one branch can not be legislatively conferred upon another. The solution lies in a proper determination of the limits of legislative and judicial power."

This approach to the matter is along the same line as that of the Justices of the Supreme Judicial Court in their advisory opinion to the Senate in 1932 as to the independent authority of the Supreme Judicial Court to regulate admission to the bar as a judicial function conferred upon that court by the constitution. The fact that statutes have been passed in aid of the court in exercising their authority and that these statutes have been observed and followed by the court does not mean that the court has not constitutional authority independent of the statutes to regulate practice and procedure in the interest of a better administration of justice, when the court is directly charged by the constitution with the responsibility for such administration by the 30th Article of the Bill of Rights.

It has always been the practice of the Massachusetts courts to co-operate harmoniously with the legislature as a co-ordinate branch of the government with the respect which is due from one department to another, but this does not alter the fact that the constitutional responsibility for the regulation of procedure in the interests of justice remains primarily upon the court under the constitution, and in the rush of modern business and the need of adjusting such procedure to the determination of controversies by modern methods there seems to be nothing to prevent the exercise by the court of its rule-making functions.

By calling upon the bar and Committees of the bar, as officers of the court, for suggestions, with such assistance as the Judicial Council may be able to give, progress seems possible without bothering an overburdened legislature and its committees, *under the authority now recognized by the statutes and decisions, regardless of the proposed broader legislative recognition in the*

bill above referred to. Accordingly we submit two rule-making suggestions for the consideration of the bench and bar as follows:

A Proposed Rule Relative to Accounts in Probate Courts

The Supreme Judicial Court has full equity jurisdiction "under the general principles of equity jurisprudence," G. L. c. 214, §1 and "general superintendence of all other courts . . . to correct and prevent errors and abuses therein if no other remedy is expressly provided," and under G. L. c. 215, §30, it may not only "alter and amend" rules made by the probate judges, but may "from time to time make such other rules and forms for regulating the proceedings in the Probate Court as it considers necessary in order to secure regularity and uniformity."

While the strictly probate jurisdiction was inherited from the ecclesiastical courts, as pointed out by Chief Justice Shaw in *Peters v. Peters*, 8 Cush. 539, the jurisdiction of the probate courts in equity and other directions has expanded to such an extent that it has concurrent jurisdiction with the Supreme Judicial and the Superior Courts of a broad scope under G. L. 215, §6 and §3. It has much jurisdiction which came from courts of equity rather than from the ecclesiastical courts, and in all matters relating to fiduciaries, whether "probate" fiduciaries like executors or administrators, or equitable fiduciaries like trustees, the same equitable rules as to fiduciary duties apply to a great extent.

The legislative extension of the jurisdictions has not only modified, but largely eliminated, the reason for differentiating in any strict sense between probate procedure and its principles and equity procedure, as applied to such matters as reasonable practice in accounting by fiduciaries.

Whatever may be the parentage of the current statutory practice about the accounts of executors or administrators, when a trustee appears in a probate court with an account, in the language of Chief Justice Rugg in *Cook v. Howe*, 280 Mass. at p. 329, "He is in a probate court with respect to a matter where the proceedings are to be considered to be for all purposes in equity."

Outside of Massachusetts, it appears to be not only the sensible, but the general, practice on fiduciary accounts, that the decree of approval or settlement of an account is not reviewable later on, on a subsequent account, except for fraud or manifest error which is the general ground on which decrees of various kinds can be opened (See Bogert, "Trusts and Trustees," 1935, Vol. IV, §973, pp. 2841-2848). The opinions in *Coulson v. Seeley*, 277 Mass. 559 and other cases apply G. L. c. 206, §19 to trust accounts. There was no rule of court on the subject at that time. §19 simply

provides that the account may be opened "to correct a mistake or error therein." The subsequent clause in the statute would seem to be merely declaratory of the law as to fraud. The fact that these statutes developed as rules of probate law during a period when equity jurisdiction in Massachusetts was restricted, even in the Supreme Court, seems no reason for holding that, with the general legislative expansion of the Probate Court into a court of general equity jurisdiction within its field, the rule-making power of the Supreme Judicial Court, in the exercise of general superintendence, should be so narrowly construed that it can not be used to establish a reasonable rule of practice about accounts in the interest of justice and public convenience to settle things when parties have had an opportunity to object and have not done so. That is the rule in all kinds of other proceedings, contested or uncontested.

The legislature has not acted on the bill drawn and recommended by the Judicial Council in its eleventh and twelfth reports.

As already stated, the Supreme Judicial Court as the supreme court of probate, as well as of equity, has not only authority to make rules in equity, but, under c. 215, §30, as to any proceedings in the probate court that it considers necessary "in order to secure regularity and conformity." Under §3 of c. 211, it has "superintendence to correct and prevent errors and abuses."

We submit that under a reasonable interpretation of the general powers and functions of the Supreme Judicial Court, there is nothing in the opinions or the statutes to prevent it from establishing a rule of finality for a decree allowing an account, similar to the rule of finality as to decrees in other judicial proceedings.

We recommend to the consideration of the Court the following

TENTATIVE DRAFT RULE

G. L. c. 206, §19, shall be hereafter interpreted and applied so that all accounts of fiduciaries if allowed, whether settled according to §24, §22 or §23 of c. 206, after due notice and opportunity to be heard, or after being assented to, shall be finally determined by decree allowing the account which decree shall not be impeached except for fraud or manifest error.

The purpose of this rule is to "secure regularity and uniformity" in the effect of decrees in the probate court so that the decree on an account will carry the same weight as other decrees on other matters within the jurisdiction of the court, and acquiescence either by actual consent or failure to appear after due notice will have the binding force usually attributed to it in judicial proceedings, subject, as in the case of other judicial proceedings, to the inherent power of the court to revoke decrees for fraud or manifest error.

A Suggested Rule as to Appointment of Receivers and Other Fiduciary Managers of Property, by a Court of Equity

A bill was introduced in 1937 in regard to this subject, and, while no legislation resulted, it seems desirable that the sort of discussion which is incidental to proposals of this nature should be reduced to a minimum and that this may be more wisely done by rule of court.

In the probate courts, the statutes have provided for many years that an executor named in a will or that a person specified by statute as having a right to be appointed as administrator or a person requested by the beneficiaries of a trust, etc., shall be appointed unless the court finds that the person thus specified is not a suitable appointment. The obvious reason for this statutory practice is that the wishes of those primarily interested shall be consulted and followed by the court unless there is some good reason for not doing so. Even in the appointment of a guardian of a child above a certain age, the wishes of the child are considered very properly.

The federal bankruptcy law (U.S. Code Title 11, Ch. 5, §72), provides that, "The creditors of a bankrupt estate shall . . . appoint one trustee or three trustees of such estate". If the creditors do not appoint, the court shall do so. The practice under this system is further regulated by the rule of the Supreme Court of the United States (General Order XIII) that, "The appointment of a trustee by the creditors shall be subject to be approved or disapproved, and he shall be removable, by the referee or by the judge" (See Gilbert's Collier on Bankruptcy, 4th. Ed. pp. 674-678).

In a court of equity, however, when a receiver is appointed, we understand it to have been a common practice of long standing for the court to select the receiver or the receivers without giving the creditors or beneficiaries, primarily interested, an opportunity to express their wishes subject to the approval of the court.

When the conditions call for appointment of a temporary receiver, this practice may be justified occasionally because of the need of prompt action to avoid injury to the business or other property involved; but, when it comes to the selection of a permanent receiver, a somewhat different question is presented. We believe that in most cases the creditors and others interested or their representatives are competent to express reasonable wishes as to the selection of persons to represent their interests. As stated by the Judicial Council in its 13th report (p. 48) "when courts administer property, the owners of the property should

have a voice in the selection of the managers." The adoption of a rule recognizing this fact subject to the approval of the court might relieve the courts to some extent of a difficult burden, the administration of which may be unfortunately misunderstood.

We respectfully suggest that the Supreme Judicial and the Superior courts consider the adoption of such a rule, and, as a basis for discussion, submit the following

TENTATIVE DRAFT RULE

Whenever it is necessary or advisable in the opinion of a court of equity to appoint a receiver or other fiduciary to manage property, the creditors or other persons primarily interested shall be given an opportunity to file a written expression of their preferences with their reasons, as to the persons to be appointed for consideration before the discretion of the court is exercised in the matter of appointment unless the court finds facts warranting some other course of action.

F. W. GRINNELL.

**EXTRACT FROM THE REPORT OF ATTORNEY
GENERAL DEVER**

*Suggested Amendment to the Law Relative to Criminal
Investigations and Related Matters.*

In order that the pending investigation growing out of organized crime, so called, gangsters and their associates, may be carried on speedily, unremittingly and effectively, as the Attorney General, I am respectfully requesting that in the present emergency I be vested with power, which now is not entrusted to me, to conduct an immediate investigation of matters concerning public peace and public safety, without which an exhaustive investigation designed to check and remedy existing evils cannot be expeditiously conducted.

New and effective modes of procedure must be installed by the General Court to meet the present threat of organized professional criminals, and the law enforcement officers must immediately be given adequate power to carry on their investigations and activities.

For these reasons, I am submitting herewith drafts for legislation which would empower me to carry on *ex parte* investigations concerning the commission of crimes and abuses of a criminal nature, and, as incident thereto, give me the power to summon witnesses and to examine them under oath in any

independent inquiry the Attorney General may institute, with authority to delegate the carrying on of the whole or any portion of such inquiry to any of my staff or any of the District Attorneys whom I may select. This legislation would give to me or to those to whom I may delegate it, the authority to grant immunity from prosecution to witnesses who give testimony relative to the commission of certain criminal acts. Obviously no exhaustive or effective investigation designed to remedy any of the existing evils to which I have alluded can be conducted effectively by the Attorney General unless he has such power.

I respectfully call your attention to the fact that there is a precedent for such power. In recent years the Attorney General was given this authority in the so-called Garrett investigation, and more recently, in 1936, the courts were given this power by chapter 242 of the Acts of 1934. I have suggested in this legislation that this power be terminated in January of 1939, and have made this suggestion in view of the fact that I feel this power necessary only in the present emergency.

I am also requesting the Legislature to liberalize the law concerning the change of venue. The theory and practice prevailing in England at the time of the settlement of this Commonwealth were to secure indictments and to conduct the trial in the county where the crime was committed. The trial court, however, always had authority to transfer the trial to another county if the interests of justice so required. It is settled in this Commonwealth that the Superior Court has the power to grant a change of venue. *Crocker v. Justices of the Superior Court*, 208 Mass. 162. The exercise of that power in capital cases is recognized by G. L., c. 277, §51.

While the power to change the place of trial is inherent in the Superior Court, yet it has been sparingly exercised, and only then when it is shown that a fair and impartial trial cannot be had in the county in which the alleged crime was committed. Usually it has been the defendant who has requested a change of venue. There, however, are instances where the Commonwealth, in the interest of justice, should be granted a change in the place of trial. Such a change should be made, unless cause to the contrary be shown, if the Attorney General acting upon his solemn responsibility makes oath that the ends of justice necessitate a change in the place of trial. No inconvenience or injustice will be imposed upon a defendant by compelling him to stand trial in some remote county of the Commonwealth, as the bill now suggested is limited to a transfer to an adjoining county.

I am therefore recommending the enactment of legislation covering this subject.

This program is indispensable to the effective administration of our laws. It is, however, in no way intended to relieve local police units of their responsibility. There is no intention on the part of the Attorney General to supersede any local authority in a community which has a police force which has not broken down. These powers, if granted, will be used in co-operation with local officials. Their responsibility is primary and binding.

In view of the recent situation which has been uncovered in Revere, evidence of which is already in my possession, of glaring malfeasance, misfeasance and nonfeasance in the administration of the Mayor's office, action for his removal appears to be absolutely necessary. Under the present law no method of removal exists. A deplorable state of affairs appears to be now existing and to have existed for the past two and one half years. A decadent civic spirit and a degenerate municipal consciousness cannot help but remain passive under the present circumstances.

I am suggesting, therefore, an amendment to the law which would give a majority of the justices of the Supreme Judicial Court the right to remove from office the mayor of any city if after hearing sufficient cause therefor is shown, and it appears that the public good so requires.

I am also submitting a draft for legislation which would authorize the setting up of a special grand jury drawn from the entire Commonwealth for the hearing of criminal cases which in the opinion of the Attorney General could be more effectively disposed of by such a state-wide jury. This recommendation follows somewhat the situation in the neighboring State of New York, where the District Attorney of the County of New York has the right to select his own grand jury and petit jury in the trial of criminal cases of a nature similar to those with which we are dealing.

An Act Relative to Certain Investigations by the Attorney General Concerning the Commission of Crimes and Criminal Activities.

Whereas, The deferred operation of this act would tend to defeat its purpose, therefore, it is hereby declared to be an emergency law necessary for the immediate preservation of public convenience.

Be it enacted, etc., as follows:

The attorney general may, if in his judgment the public interest so requires, conduct ex parte investigations concerning the commission of crimes and criminal activities of organized

crime, and incidental thereto shall have the power to require by summons the attendance and testimony of witnesses, and the production of books and papers relating in any way to such investigation, in the manner provided in chapter two hundred and thirty-three of the General Laws. No person shall be excused from attending and testifying in the course of such investigation or from producing any books, papers or documents before the attorney general on the ground that his testimony or evidence, documentary or otherwise, may tend to criminate him or subject him to a penalty or forfeiture, but he shall not be prosecuted or subjected to penalty or forfeiture for or on account of any action, matter or thing as to which he may be required to testify or produce evidence, documentary or otherwise, in the course of such investigation, except for perjury committed in such testimony.

The attorney general shall have authority to delegate any of the powers herein conferred upon him to any assistant attorney general and to any of the several district attorneys whom he may appoint to assist him in the conduct of such investigation, who shall thereupon have the same powers as are herein conferred upon the attorney general, but subject always to his direction and control.

Nothing in this act shall be construed as diminishing the powers and duties of district attorneys and other prosecuting agencies fixed by law. The powers granted to the attorney general under this act shall be terminated as of January fifteenth, nineteen hundred and thirty-nine.

THE RECURRENT PROPOSAL TO REMOVE MAYORS THROUGH THE COURTS

The following discussion was printed in several newspapers in January and is printed here also for convenient reference.

To the Editor:

Sir—As last night's papers reported a hearing before the judiciary committee on the proposal frequently made and rejected by the Legislature in the past that the burden of removing mayors of cities should be placed upon the courts, I call the attention of your readers to objections to this proposal, which I stated in a letter to the press, March 29, 1923. The plan then proposed was to provide for the removal of mayors by three judges of the Superior Court. I understand from the press reports that the present proposal is for removal by a majority of the Supreme Judicial Court.

While these plans show genuine confidence in our courts and our method of selecting judges, the adoption of the plans would be a most unfortunate step. With the business of the Supreme Judicial Court and the Superior Court congested, and the District Court system so arranged by law that it multiplies the different problems facing the judicial system of the State as to the administration both of civil and of criminal law, it would seem a strange proceeding to provide that the time of the judges, either of the Supreme or of the Superior Court, should be at the mercy of those engaged in the problems of municipal house-cleaning, however important such a proceeding may be.

The fact that the Legislature, 75 years or more ago, extended the jurisdiction of the Supreme Judicial Court to include the removal of district attorneys and certain others having to do with the administration of justice, and that the court, on two notable occasions, almost 20 years ago, performed the difficult duty thus placed upon it in a manner to inspire confidence and respect, is not a reason for extending this sort of jurisdiction and turning the courts into general guardians of the public morals of office holders.

It should be remembered that on each of those occasions, five justices of the Supreme Judicial Court were obliged to drop all of their other important appellate work and sacrifice their much-needed summer vacations to sit for four or five weeks in the hearing of each case, besides the burden of the preparation of the considered judgment. Those two cases required a seriously large portion of the time and strength of the court.

The public is complaining of the delay in the administration of justice. The division of labor and the placing of practical responsibility in a government like ours must be looked at from the point of view of common sense and in a sound perspective. As the late James B. Thayer pointed out:

"Under no system can the power of courts go far to save a people from ruin; their chief protection lies elsewhere . . . If this be true, it is of the greatest public importance to put the matter in its true light . . . The safe

and permanent road . . . is that of impressing upon our people a far-stronger sense than they have of the great range of possible mischief that our system leaves open and must leave open."

The normal work of the courts is sufficient to occupy their entire attention. Is it good business judgment to thrust this additional burden on the courts? I say it is not.

FRANK W. GRINNELL.

7

THE FUTURE OF JUDICIAL REPORTING?

The delay in the appearance of the Massachusetts Reports, which are now about 2½ years, or about 9 volumes behind,* was discussed in the thirteenth Report of the Judicial Council, recently published. Since the appearance of that report, a letter has been received by the Editor of the *Bar Bulletin* from the chairman of the *Special Committee* of the American Bar Association "on the duplication of legal publications." The accumulation of legal literature is discussed in this letter as a nation-wide problem, and, as the chairman of the committee, Professor Eldon R. James, is also the Librarian of the Harvard Law School, and, therefore, because of the extraordinarily large collection in that library, has a fuller knowledge of the facts than almost any one else in the country, his letter has been called to the attention of the Judicial Council and is also printed here for the information of the bench and bar in order to provoke discussion and suggestion.

LETTER FROM ELDON R. JAMES, ESQUIRE.

To the Editor:

The Special Committee of the American Bar Association has been engaged for the last year in studying the question of unnecessary duplication of legal publications. It has come to the conclusion that duplication exists chiefly in the matter of reports. There exist in every state, at least, two series of duplicate reports, the official series and the reports issued by the West Publishing Company in the National Reporter System. There are, of course, certain series of reports in the states which are not official, however, and which are not included in the reporter system. In some jurisdictions there are more than the two series of reports.

The burden of all of this duplication is very great, not only upon the libraries, but upon the bar. The fact that there are these various series of identical, or practically identical, reports, also

* The most recent bound volume of Massachusetts Reports—No. 290—concludes with two opinions handed down on May 1, 1935. It appears from the *Bar Bulletin* (No. 132, February, 1938, p. 14) that the decisions from May 1, 1935, to January 18th, 1938, total 1,001—approximately nine bound volumes. There were two bound volumes of the Reports delivered to the bar in 1936, and one in 1937. If three bound volumes are issued in 1938, containing together 360 opinions, the situation on January 1, 1939, will be approximately what it was in January of this year, i. e., nine volumes in arrears.

very greatly increases printing costs for all types of legal publications. The necessity for giving dual or triplicate citations is one of the causes, although not the greatest of the increased cost of law books.

It occurred to our committee that possibly there might be some way of doing away with this duplication and that the bench and the bar might be induced to make a choice between the official reports and the unofficial reports. Unless some such choice is made, of course, there is no possibility of reducing duplication.

Unofficial reporting is, of course, strictly in accordance with the historical tradition of the common law world. There are no official reports in England and never have been. At the most, the Law Reports issued by the Council of Law Reporting have only a semi-official standing. All the rest have not even that. The official series of reports in this country are usually quite delayed in appearance so that judges and lawyers are required for not inconsiderable periods to depend entirely upon unofficial reports. Would it not be possible for them to depend entirely upon unofficial reports and thereby secure the discontinuance of the various official series?

It would seem quite difficult to develop the various official series, so as to give the profession the quick service, which at the present time, it receives from the publishers of the unofficial reports in the way of advance sheets. In addition, the publication of official reports involves the various states in very considerable expense, an expense which would seem to be unnecessary, in view of the prior publication of unofficial reports, which are constantly being used by the bench and the bar. There are five or six of the American states, which are now publishing state series, in which the reports are simply reprints of the unofficial system. While this might be considered undesirable, it does seem to make possible a very considerable reduction in costs for it eliminates all official reporting and the expense incident thereto.

My committee is not suggesting the wholesale adoption of the National Reporter System. It might be desirable to have changes in that system, as it now stands. An attempt to procure those changes would probably not be received unsympathetically by the publishers, if these requests were backed up by an expression of the desires of the bench and the bar.

Duplication, however, is not the only problem which faces the law book buying public. There are many other problems involved. The problem of mere bulk, for example, is one of the most pressing.

There are too many decisions being published. Too many long opinions are being written. There is entirely too much printing being done. It will not be very many years before the question will be recognized as an acute one, as to whether we can continue in view of the mere bulk of legal materials, the use of precedents in the way in which they have been used in the past. The difficulty even now of making thoroughgoing investigations of the decisions is patent. The digests are too large. The bulk of the decisions is too great. In another generation, it is unlikely that the libraries and the bar will be able to buy the digests or the annotated statutes of that time. The new Pennsylvania Digest is being sold for \$400. In twenty-five years when the next Pennsylvania Digest comes out, it will probably sell for \$1000. Annotated statutes have in many of the states increased during the past generation from two or three volumes to ten or more. In the next generation, the increase will be in proportion. When this time comes, who can buy them? The individual lawyer can't. The library which serves him is unlikely to be able to do more than buy the material from one jurisdiction and perhaps, may not be able long to continue that. The bar is, therefore, faced with a practical problem, that of controlling in some way or other, the mere bulk of reported decisions, with which they are now being flooded. I have said nothing about statutes. I don't know how the outpouring of statutes can be controlled, but possibly something can be done in the matter of controlling decisions, if the bench and the bar are sufficiently aroused.

I hope I have not written at too great length, but the problem is not without its importance to all of us who are interested in the administration of justice, according to the historical methods of the common law.

ELDON R. JAMES,
Chairman.

Professor James' picture of the condition with which the bar and the law libraries of the country will be faced within a short period of years brings up a very practical question for current consideration before the state goes to additional expense in an endeavor to bring up to date the Massachusetts Reports.

The state reports with their elaborate index, etc., have been at least a year behind, and generally much more than that, for ten or fifteen years. The only difference between the present situation and the earlier one is that they are more behind now than they were before. The bound reports, when they do appear, cost \$3. a volume. The unbound advance sheets cost each subscriber for that service \$12. a year. The unbound advance sheets are very inconvenient for practical use after they have accumulated during a long period.

Meanwhile, the West Publishing Company, which publishes the *Northeastern Reporter*, provides for the price of \$14. a year, the advance sheets within two or three weeks after they appear in the *Northeastern Reporter*, and also provides bound volumes of the cases thus reported (as soon as a sufficient number of cases are printed to make up a volume), under the title of *Massachusetts Decisions*. The bound volumes are received about every six months, have an index, table of cases and statutes, key references, etc., cost much less and take up less shelf-room than the official reports. Naturally, an increasing number of lawyers are beginning to use them and, undoubtedly will continue to do so, regardless of the question whether the state reports are continued and brought up to date.

Judge Story, in an address to the Suffolk Bar in 1821, expressed his apprehensions at the accumulation of legal literature of that time when there were only seventeen volumes of Massachusetts reports, and only about half as many states as there are today. The accumulation is 117 years greater today than it was then, with many more jurisdictions contributing. In a number of these jurisdictions there are several sets of reports from different courts.

The Massachusetts decisions, besides appearing in the *Northeastern Reporter* and in the official advance sheets and volumes, also appear now in the *Banker & Tradesman* in a special weekly legal edition covering all the courts, state and federal, which issue written decisions. This legal edition costs \$8. a year.

We learn from the Secretary of the Commonwealth that the state now prints an edition of 3,750 copies of each volume of the reports. 414 of these copies are distributed by the state to the various courts and other places where a set of reports is needed in connection with the public service.

The contract price of each volume is \$2.30, the selling price is \$3.00. There were 834 subscribers to the advance sheet service in 1937, the cost of subscribing being \$12. per year.

The following table shows the distribution of Volumes 280 to 290 inclusively, the edition for each volume being 3750:

Volume	Sold	Free
280	2152	414
281	2153	414
282	2156	414
283	2124	414
284	2112	414
285	2086	414
286	2068	414
287	2055	414
288	2042	414
289	1989	414
290	1841	414

The cost of printing and binding the whole edition of *each* volume is \$8,625. As the reports are now about 9 volumes behind, it will cost the state \$77,625 merely to print and bind those volumes to bring reports up to date. The appropriation for the reporting system for the year 1937 was \$16,700 (see St. 1937, c. 234, items 45 and 46 and c. 434, item 46). Taking that figure and assuming the appearance of 3 volumes a year (instead of one or two as at present) it would take 3 years at a cost for the reporter's office of \$50,100 plus the cost of printing and binding of \$77,625, making a total gross cost of \$127,725 for 9 volumes and then we would still be 9 volumes behind.

Volume 289, which appeared in 1936, contained 721 pages including index. It contained the opinions from January 2, 1935 to February 26, 1935 (less than two months). Volume 290, containing 703 pages which appeared late in 1937, contains the cases from February 26 to May 1, 1935. Thus two volumes have appeared in the last 2½ years since July, 1935, at a cost to the state for reporting and printing as follows:

Printing and binding Volume 289	\$8,625
Printing and binding Volume 290	8,625
Reporter's office 1936 appropriation	15,685
Reporter's office 1937 appropriation	16,700
	<hr/>
	\$49,635

This does not include part of the cost of the reporter's office during the latter part of 1935.

In return for all this expense, the state has received:

From sales of Volume 289, 1,989 copies at \$3..	\$5,967
From sales of Volume 290, 1,841 copies at \$3..	5,523
	<hr/>
	\$11,490

Deducting these receipts from the above cost of \$49,635 leaves a balance of \$38,145 which appears to represent the net cost to the state of producing two volumes in 2½ years since July, 1935.

Meanwhile, the table of sales shows that the market of the state appears to have fallen off 311 volumes since Volume 280 and 200 volumes since 1935.

Is this a good business investment for the public?

The first West Publishing Company volume of *Massachusetts Decisions* contains all opinions from April 1 to December 1, 1936, and the second volume all cases from December 1, 1936 to July 1, 1937. The company is also advertising the *Massachusetts Decisions* from 1884 (the date when the *Northeastern Reporter* began) to date in 40 volumes "covering over 150 volumes of State Reports" and occupying "only two bookshelves".

What should be done? The private reporter systems have a wider and established market both inside and outside of Massachusetts, which will enable them to compete with the state's reports to an increasing extent so that the deficit of the state seems certain to increase.

We submit these facts and Professor James' letter for the consideration of the profession and the public authorities. As he points out "unofficial reporting is in accordance with the tradition of the common law world. There are no official reports in England and never have been."

F. W. G.

THE PROBLEM OF OPINIONS.

This is a problem of nation-wide proportions as shown by the letter of Professor James in this number.

In the first number of the *American Jurist* in 1829 appears an address delivered before the Boston bar in 1821 by Judge Story in which he said:

“It is impossible to look without some discouragement upon the ponderous volumes which the next half century will add to the shelves of our jurists. The habits of generalization, which will be acquired and perfected by the liberal studies which I have ventured to recommend, will do something to avert the fearful calamity which threatens us of being buried alive not in the catacombs but in the labyrinths of the law.”

The habits of generalization to which Judge Story referred have done a great deal more than he believed possible in 1821 and he, himself, as an individual thinker, was a leader in developing those habits by his text books.

Writing in 1909, the late John C. Gray said, in his “Nature and Sources of the Law”:

“The enormous number of judicial decisions, and the rapidity in their rate of increase, has been so great as to indicate that the function of the jurist will rise more and more in importance in the Common Law, from the mere fact that the mass of material will become too great for any one to cope with it all, and that it can be dealt with only by systematic study directed to particular parts. At the end of the eighteenth century the total number of printed volumes of reported cases in England, Ireland, the English colonies, and the United States of America was two hundred and sixty. At the end of the year 1865 they had increased more than twelve fold to over three thousand, not including the Indian Reports, and at the end of the nineteenth century the published reports of decisions in the United States alone were contained in about six thousand volumes.

“The work of the jurist is therefore likely to rise in importance during the coming years, and a corresponding improvement in the quality of treatises on the Law may be confidently expected. If the Common Law has been wise in attaching great weight to precedents, it has certainly not held out sufficient welcome, I do not say to actual, but to possible, jurists.

"Notwithstanding the difference in the comparative weight attached to the opinions of judges and of jurists in the Common and in the Civil Law, it is a matter of prime importance to observe that in both systems alike the development of the Law has been mainly due, neither to the legislatures on the one hand, nor to the people on the other, but to learned men, whether occupying judicial position or not."^{*}

On the other hand, the Joint Special Committee of the Massachusetts Legislature, in its report in 1859, said:

"It is an easy thing for a judge to state, in writing, the points decided, and return them in the rescript. An extended opinion is not required. An essay accompanying a decision more often bewilders than enlightens. 'An over-speaking judge was no well-tuned cymbal,' even in the early days of Francis Bacon, when dockets were less crowded than now; he is a positive evil in our time. Any legislation that tends to secure speedy decisions and concise statements of legal principles, in the present age of inflated general and legal literature, will be hailed with enthusiasm by the profession and the people. Under section 48 these important ends will be attained. . . .

"The complaints of the profession and the public will be answered by the speedy promulgation of the law as provided in the closing lines of that section. . . .

"The public and the profession would be quite satisfied with such opinions, as a learned and intelligent court like ours should be content to give in the form of a rescript. It is law rather than literature that is sought for in our reports."

Section 48, referred to and recommended, reads as follows:

"Sect. 48. The supreme judicial court shall, as soon as may be after the decision of the questions submitted to them, send down such order, direction, judgment or decree, as may be fit and proper for the further disposition of the cause, by a rescript which shall also contain a brief statement of the grounds and reason of the decision announced, and such rescript shall be filed in the case. And if no further report of the decision is written out within sixty days from the date of such rescript, the reporter of decisions shall report the case, with the opinion contained in such rescript."

This section was adopted and now appears in substantially the same language in G. L. C. 211, §§ 8 and 9. Of course the committee did not mean to suggest that all cases could be adequately covered by

* We do not believe in codification. The history of that movement in Massachusetts appears in the MASSACHUSETTS LAW QUARTERLY for August, 1916, p. 319. The restatements of the American Law Institute, which show the development suggested by Mr. Gray, of the importance of "jurists" (much abused word so commonly and erroneously used as synonymous with "judges") are not codifications (See MASSACHUSETTS LAW QUARTERLY for May, 1923, pp. 73-81).

a rescript. Cases of first impression, cases in which authorities are conflicting or obscure in their meaning so that the law of the particular jurisdiction is uncertain, some constitutional questions of far-reaching importance if not clearly settled, cases in which the court decides to overrule or clearly modify prior decisions, and occasional cases which for some reason are of great public importance, call for more extended opinions to develop the law and guide the profession in future; but for many years there has been a growing judgment at the bar that memorandum (rescript) opinions are sufficient for most cases which do not fall within the classes just described.

We believe that the law will be clearer if we have fewer extended opinions and that the publication of the voluminous citation of cases for settled rules of law should stop. The citation of one or two cases should be sufficient for most purposes, either in a rescript or an opinion. Shepard's citations will supply the others for any one who wants them.

We appreciate fully the difficult problem with which our judges are faced. We are most fortunate in having so able a court and these remarks are made in no critical spirit, but merely to point out the need of change in the traditional practice. "Adequate brevity" is difficult to attain, but we believe it must be attained. We are facing a condition and not a theory. That condition will demand that the bench and bar of the future must not only develop those "habits of generalization" of well-trained minds coupled with that intangible rarity called "judgment", but also habits of abbreviation involved in a clear power of statement.

F. W. GRINNELL.

DECLARATORY TREASURY RULINGS—A NEW APPLICATION OF DECLARATORY PROCEDURE.

(Extract from an article by Herman Oliphant, General Counsel for the Treasury Department in "American Bar Association Journal" for January, 1938.)

It is easy to take for granted the practical difficulties caused by present law and administrative procedure thereunder. Their very age tends to make them seem normal and natural and a necessary part of the state of things. These difficulties are lost in the obscurity of the familiar. But how surprising and harmful the operation of present procedure often is becomes clear when we consider what

life outside the field of law would be like if it were as uncertain as government frequently leaves many of the affairs of those who must act but cannot find out what the legal consequences of their action will be. . . .

A partial, but only a partial, solution of this difficulty is to be found in our legislation providing for declaratory judgments. Such judgments cannot be obtained in the great mass of cases where people have not yet acted and need to have their rights and liabilities fixed and known before they act. It is true that, if a contract has been made, if a deed has been executed or a status, such as marriage or divorce, is present, the declaratory judgment can be used in many situations to define rights incident to such an existing arrangement or status; but a declaratory judgment would ordinarily afford no help to a man who wants to embark upon a business undertaking and needs to know his rights and liabilities before he dare do so. That field is not covered, and a long stride forward in solving some of the growing problems of administration will be made if we can find dependable methods of advising people what their rights and liabilities are at the time they need to know.

The problem of finding and developing such a method was put before the Legal Division of the Treasury some two years ago as a general chore for all to work on as the press of immediate tasks permitted. Later, the collective thinking on the problem was cast into an integrated statement and outside suggestions and criticisms were sought. Numerous revisions followed. This work has now culminated in what seems to be a feasible device, which, for want of a better name, has been called "Declaratory Administrative Ruling" or "Declaratory Ruling." Recently, the plan of this new device received the tentative approval of a subcommittee of Congress. If approved by Congress, the purpose is to begin in a small way and try it out in the administration of our tax laws. If it works well there, it would seem to be applicable to numerous and large areas of governmental administration.

Perhaps the plan can best be presented in terms of a typical case in which this device could be used. John Smith owns valuable mining property which he desires to sell. The important factor in the transaction is the value which will be fixed on this property for tax purposes. Before he makes the sale, John Smith needs to know definitely what value the Commissioner of Internal Revenue will place upon this property. It is to be borne in mind that, if today he asked the Commissioner for a ruling on this question prior to

the sale, the Commissioner would not ordinarily make it. Moreover, even if the Commissioner fixed the value, the taxpayer could not be certain that, after he had completed the sale in reliance upon such a ruling, the Commissioner or his successor would abide by it in later determining his tax liability in the due course of tax administration.

Briefly, the proposal is this: The taxpayer would file with the Commissioner an application for a Declaratory Ruling. In this application, he would describe in detail the proposed transaction. The Commissioner would examine the application to determine whether it merited consideration. If he found that it did, he would ascertain whether enough information to enable him to reach an intelligent conclusion had been provided. If not, he could either request more information from the taxpayer or make any other investigation that he deemed necessary to the same extent that investigations of closed cases coming before him are now made. The taxpayer would have an opportunity to appear in person and present any additional information or considerations that he thought relevant. The Commissioner would then issue a Declaratory Ruling in which, in the example supposed, he would fix the value of the property or make such other ruling as was requested or was appropriate in the case before him. He could make the effectiveness of the ruling depend upon compliance either by the taxpayer or by other persons with certain terms and conditions such as the consummation of the contemplated sale within a definite period of time.

The taxpayer, having received the Declaratory Ruling, might decide it was inadvisable to complete his transaction. If so, the Declaratory Ruling would not become effective. If the taxpayer decided to proceed with the sale and pay a tax upon the value fixed in the Declaratory Ruling, the transaction would be ended. If, however, the taxpayer did not believe that the Commissioner's determination of the value was the correct determination, he could not appeal from the Commissioner's ruling (the Commissioner is given an absolute discretion with regard to his ruling), but he could proceed to complete the sale and test out his tax liability before the Board of Tax Appeals or in the Courts as he may do today. In that event, the Commissioner would not be bound by the Declaratory Ruling since the taxpayer himself had chosen not to be bound by it, and the matter would be litigated in the Courts as if no Declaratory Ruling had been issued.

However, if the taxpayer acquiesced in the ruling and completed the transaction in accordance with the terms of the Declara-

tory Ruling, neither the Commissioner who issued it nor any later Commissioner could alter or repudiate it. The Commissioner, however, would be free to make a different ruling with regard to transactions not expressly included in the ruling and persons not parties to it.

After the sale had been consummated, the taxpayer, if he desired, might request the Commissioner to issue a certificate of compliance stating that the taxpayer had complied with the terms and conditions set forth in the Declaratory Ruling. The issuance of this certificate would make his proper compliance with the conditions of the ruling a matter of record.

The Declaratory Ruling should be useful in almost all kinds of tax cases, but it should be especially helpful in disposing of those tax questions which sometime affect in the same way tens of thousands of taxpayers similarly situated. Thus provision has been made to determine in what year particular securities became worthless and thereby to settle at one time their tax status for all the hosts who may hold them.

THE BILL FOR A BUSINESS MANAGER OF THE
FEDERAL COURTS.

January 29th, 1938.

HON. HENRY F. ASHURST,
Chairman, Judiciary Committee,
Senate Office Building,
Washington, D. C.

DEAR SIR :

I understand that Senate bill S. 3212 is set for hearing before your committee on Wednesday, February 2nd, and I am asked by Mr. Vanderbilt, President of the American Bar Association, to appear in support of the bill. As it is impossible for me to get to Washington, I am writing this letter in the hope that it may be of some assistance to your committee in considering the matter.

Senate number 3212 would establish an administrative office of the United States Courts with a director and assistant director appointed by the Supreme Court of the United States as the administrative officers of the United States Courts, under the supervision of the chief justice of that court and of the Conference of Senior Circuit Judges, to attend to the various matters specified in the bill, all of which come under the general head of strictly busi-

ness management, much of which is now handled by the Department of Justice or by the Attorney General in addition to all the other important duties imposed upon that department and that officer.

In supporting this bill, I am expressing merely my own personal views as the matter has not been considered by the Massachusetts Bar Association. I support the bill for the following reasons.

Lawyers in general are not distinguished for their business capacity as administrators, and the practical business aspect of the administration of justice has been largely overlooked in the development of our system to meet modern needs. In an address before the American Bar Association in Boston in 1919, Mr. Justice Riddell of the Supreme Court of Ontario made a statement which deserves the serious consideration of lawyers and laymen. He said:

“We—regard the courts—as a business institution to give the people seeking their aid the rights which facts entitle them to and that with a minimum of time and money. We can not afford to waste either time or money.”

As stated by the Judicature Commission in Massachusetts in its second report, 1920, “These few simple words seem to express the primary purpose of a judicial system”. They apply in one way to the whole subject of procedure and practice in the courts and in another way, more obvious to laymen, to the administration of the clerical system and the various employees, the plans for assignment of judges so that the judicial force may be used intelligently to meet the business load, the purchase of supplies, accounting, statistical reports, budget estimates, etc., all of which constitute an enormous business problem for the Federal Courts throughout the entire country. This problem needs men of executive ability and business training who can devote their entire time to it without the distractions of all the other problems of the bench and the law offices of the country.

Such a business executive under the supervision, of course, as provided in the bill, of the chief justice and the senior circuit judges throughout the country, is needed in the interest, not only of the courts themselves, but of the public, and I believe that such a competent executive office could do much toward accomplishing the purpose of a judicial system of “giving the people seeking the aid of the courts the rights which facts entitle them to with a minimum of time and money.”

Yours respectfully,

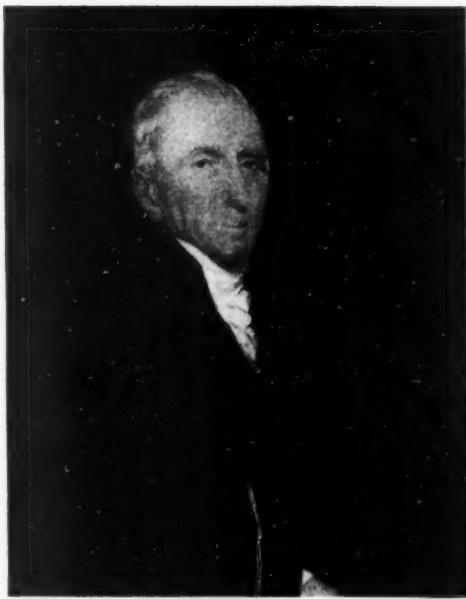
FRANK W. GRINNELL.

NATHAN DANE AND THE DRAFTING OF THE ORDINANCE
OF 1787 FOR THE GOVERNMENT OF THE
NORTHWEST TERRITORY.

Men of Ipswich and the neighboring towns contributed much to the history of American government in the formative period before and after the Revolution, and, on the occasion of the current celebration of the opening of the Northwest Territory, it is fitting that a brief tribute of remembrance should be paid, not only to Manassah Cutler and Rufus Putnam, whose portraits appear on the memorial stamp issued by the government, but also to the native of Ipswich who took a leading part in drafting the instrument of government for the territory—a document regarded as one of the great state papers in our history.

Nathan Dane was born in Ipswich on December 29th, 1752, in the part now called Hamilton where the first of his family in this country had settled as early as 1638. He worked as a farmhand until he was twenty and then, in eight months with little help, fitted himself for Harvard College where he was graduated in 1778 with a high record of scholarship. He taught school for a time while studying law with William Wetmore in Salem. After entering the bar in 1782 at the age of thirty, he settled in Beverly and rapidly demonstrated his ability. He was elected to the Massachusetts Legislature during his first year at the bar, and, after three years, was chosen as a representative of Massachusetts in the Continental Congress with John Hancock, Nathaniel Gorham, Theodore Sedgwick and Rufus King.

While there, at the time the Constitutional Convention was sitting in Philadelphia, Dr. Manassah Cutler's energy brought up the problem of the Ohio purchase by Massachusetts men for immediate consideration by the Continental Congress. The undertaking required an effective plan of government before the settlement of so large a territory was begun. The outlines of such a plan including a prohibition of slavery after the year 1800 had been suggested by Jefferson as early as 1784 but nothing came of it. When the plan for immediate immigration of New England settlers forced the issue, Dane was the real lawyer on the committee of the Congress to which the matter was referred and one of the best lawyers with imagination in the country, as shown by his later career. Dane, Melancton Smith of New York and Richard Henry Lee of Virginia, after several meetings, as Dane wrote to Rufus King three



NATHAN DANE.

days later, "agreed on some principles—we wanted to abolish the old system and get a better one for the government of the country". All agreed finally on the draft prepared by Dane and with the exception of "a few words", it was adopted by Congress as Dane drew it, including the sixth article for the immediate prohibition of slavery which was part of Dr. Cutler's plan.

Judge Story, another Essex County man, of Marblehead, in an address in 1929, referred to Dane, whom he knew well, as follows:

"His advancement to public life was always unsought by himself. . . . To him belongs the glory of the formation of the celebrated Ordinance of 1787, which constitutes the fundamental law of the states northwest of the Ohio. It is a monument of political wisdom, and sententious skilfulness of expression. It was adopted unanimously by Congress, according to his original draft, with scarcely the alteration of a single word. After his retirement from public life he devoted himself . . . to the duties of the bar; and gradually arriving at the first rank, he became the guide, the friend, and the father of the profession in his own country."

John Quincy Adams, the sixth President of the United States, wrote of him:

"My personal acquaintance with Mr. Dane has been slight . . . but I am no stranger to his character, nor to the eminent services he has rendered to his country. The Ordinance for the Northwest Territory alone, entitles him to the gratitude of this nation, and of posterity, as long as the Union shall last."

Dr. Andrew Preston Peabody, in his account of Dane, says that, so far as the anti-slavery clause in the Ordinance was concerned, it was an idea common both to Cutler and to Dane, but he continues:

"There is another article in this Ordinance, of less moment, indeed, yet of no small importance, which must have been due solely to Mr. Dane's wisdom and foresight; namely, the provision that none of the legislatures in the territory embraced in the Ordinance should ever enact any law impairing the obligation of contracts. When the Ordinance was passed in New York, the Convention for framing the Constitution was sitting in Philadelphia, and this clause of the Ordinance, copied in express terms, was incorporated in the Constitution. . . ."

During the next twenty-five years or so, after his service in the Continental Congress, he was chosen on various committees connected with law revision, including the committee which recommended abolition of whipping, branding, cropping, the pillory, etc., and also recommended the imposition of severe penalties for dueling. He was active in other ways including attendance at the famous Hartford Convention in 1814, where he was a restraining influence against some of the hot-heads who had ideas of disunion. He attended that convention, as he said, "to prevent mischief" and was glad that he "helped to avert danger".

His attendance at that convention was criticised at the time because it was misunderstood. The effect of the War of 1812 on New England and the threatened invasion of it, with a probable attack on Boston in 1814, created great excitement and resentment against President Madison's administration. Washington had been captured, and Castine and Belfast in Maine, also. As Dane described the situation existing in September, 1814,

" . . . moderate men saw the excitement was going too far and that it was leading to evils far greater than the war itself. The fact was, before it was known who would be the members [of the Hartford Convention] such was the

excitement and discontent with federal measures, that cool men and firm friends of the Union deeply interested in its preservation had some fears on this head. The convention had to steer its course between *Seylla* and *Charybdis*."

Harrison Gray Otis, Nathan Dane and George Cabot accepted their election as delegates to prevent the radical measures of extremists which would have caused a conflict with the federal government.

The resolutions of the convention passed through the hands of three committees. As Professor Morison has pointed out, "Dane was the only Massachusetts delegate besides Otis who was appointed to more than one of the major committees". Morison suggests that "possibly a majority of the Massachusetts delegates agreed in desiring more radical action than the majority [of the convention] and Otis, Cabot and Dane, combined with the others to force a moderate course" (Morison's "Harrison Gray Otis," Vol. II, pp. 111-12 and 145).

In 1800, Dane began his great digest of American law, known as "Dane's Abridgment", which ran to nine volumes during a period of thirty years and was one of the leading law books of the country. It is still a mine of information. In 1829, he devoted the proceeds of this work to the Harvard Law School (then in its feeble infancy) on condition that Joseph Story, then a justice of the Supreme Court of the United States, should be asked to lecture and that his lectures should be printed. Story accepted and this enabled Story not only to lecture, but to write his legal textbooks, on which the bar, not only in the school, but throughout the country, were trained for generations. These books are still in use. Later Dane furnished the funds to build Dane Hall, the first building for the Law School.

Dane became quite deaf in his later years, and appears to have had the distinction of sharing with John Adams a sort of honorary election to the Massachusetts Constitutional Convention of 1820, for Dr. Peabody tells us:

"His fellow-townsmen honored themselves by choosing him to the Constitutional Convention of 1820, with the clear understanding on both sides that he could not attend the sessions, but, as I well remember, with the universal feeling that the prestige of his name could not be dispensed with, even if his presence were withholden" ("Harvard Graduates Whom I Have Known"—Nathan Dane—A. P. Peabody, p. 18).

Dane died in Beverly on February 15th, 1835, at the age of eighty-two.

By his legislative service in Massachusetts, by his work on the Northwest Ordinance, by his "Abridgment" of the law and revision and compilation of the statutes which made the law more civilized and more accessible to the American bench and bar in the days of few books, by his restraining influence at the Hartford Convention, and, finally, by his generosity, coupled with imagination of the public needs, in becoming the real founder of the Harvard Law School, which has set the standards of legal education in the modern world, Nathan Dane exerted an exceptionally far-reaching constructive influence on the legal and political thought of the country which entitles him to the respectful and grateful remembrance of his fellow country-men.

F. W. G.

"YOUTH IN THE TOILS"—A NEW BOOK ON YOUNG OFFENDERS.

This thoughtful little book by Leonard V. Harrison, an experienced criminologist, and the late Pryor McNeill Grant, the founder of the Boys' Bureau in New York, just published by the MacMillan Company, deserves the attention of every one interested in the problem of crime and its prevention. It deals particularly with the effect of "reformatories" on delinquents of the critical ages between 16 and 21.

"It is necessary to be on one's guard against falling under the spell of the strongly approbative terms which are always used to describe reformatories. They are said to promote 'new standards of social behavior,' to 'inculcate habits of industry,' to impart 'a spirit of fair play in recreation,' to give 'needed discipline,' to prepare boys to become 'useful members of society.' All of these descriptions have a good ring and pictures of boys poring over books, attentive to their tasks in machine shops, and busy in the fields, produce a good impression. These aims and appearances must not be confused, however, with the actual results. The under-currents of deterioration in prison life are seldom mentioned and are never revealed by the camera.

Is there any ground for a belief that wholesale reformation of convicted offenders can be effected within large groups? We think that there is not. The belief that feelings of penitence will arise under punishment dies hard but it must be uprooted if we are to deal realistically with the problem of stimulating aspirations of right living among young offenders. The reformatory is a high type of prison well adapted to the purposes of incapacitating the most incorrigible offenders who cannot be handled safely in any other way. But to regard it as a training school suited to the improvement of congregate masses is to deceive ourselves with wishful thinking. Just as a prison for adults is in the nature of a university of crime, so is a large correctional training school all too often a preparatory school leading to the university.

It is true, of course, that under the present system of mandatory imprisonment of youths who commit more serious offenses a fairly large number of corrigible offenders are sent to these institutions. The successful outcomes which occur despite the hazards of reformatory life lend encouragement to those who have faith in the value of reform schools. They assume that the institutional training is responsible for the rehabilitation effected. We hold a widely different point of view, namely that instances of the subsequent rehabilitation of reformatory inmates is an indication that such persons need never to have been punished by imprisonment, that they were reformable from the beginning and by less costly and less hazardous means, that they were salvaged in spite of incarceration rather than because of it."

We heartily recommend the book as a valuable contribution to the study of the baffling problem with which all large cities are confronted. We have much to learn about this subject.

F. W. G.

